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Supreme Court, U.S.
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No. 92-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' lengthy brief in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that, like the lower court decisions reviewed in *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), *Spallone* v. *United States*, 493 U.S. 265 (1990), and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 230 (1992) (granting certiorari), the Ninth Circuit's decision below authorizes an enormous expansion of the "inherent power" of federal district courts—in this case the power to impose sanctions arising from an attorney's litigating behavior upon an entity that is neither a party nor an attorney. See Pet. 8-13. Respondents cite no other decisions recognizing such a power. Respondents also do not deny that, during the proceedings before the district court, petitioner was never named as a party to the litigation or served with legal process—the usual means by which a district court obtains *in personam* jurisdiction. See Pet. 13-14.

Nor do respondents dispute that this case is of immense practical importance to the public-interest legal community. See Pet. 15-18. Indeed, respondents do not even address the enormous and troubling impact of the decision below on the complex relationship among public interest organizations, their employees, and the people they seek to serve—matters addressed at greater length in the briefs *amici curiae* filed by the NAACP and Mexican-American Legal Defense and Educational Funds (at 2-4); by the American and California Farm Bureau Federations (at 6-7); by the New England and Atlantic Legal Foundations (at 12-13); and by the Mountain States Legal Foundation (at 11-13).[1]

[1] While respondents quibble over the impact the Ninth Circuit's ruling likely would have had on the conduct of *this* litigation (opp. 17-18), they do not dispute that the decision below will compel public-interest organizations generally to micro manage any

1. Nothing in respondents' submission casts any doubt on the need to resolve the first question presented in the petition.

First, respondents' principal argument—that the courts below did, in fact, find the imposition of sanctions on petitioner to be "necessary" (Opp. at 8)—rests upon a misreading of this Court's inherent power decisions. Petitioner will gladly concede (see Pet. 9-10) that the courts below believed the imposition of sanctions against petitioner was "necessary" to vindicate certain "policy concerns" (see App. A-11). As respondents point out, those concerns included the district court's desire to protect itself from perceived "misuse," to "protect the interests of litigants" (presumably from non-litigants such as petitioner), and thus to "fulfill" the "promise of procedural fairness" which the court believed inheres in the Federal Rules of Civil Procedure. Opp. 9 (quoting App. C-8 to C-9); see also Opp. 11.

However, concluding that the power to impose sanctions upon a non-party is necessary to achieve policy objectives such as "[f]ulfilling the 'promise of procedural fairness' " (Opp. 11) is quite different from concluding that such a power is "necessary to the exercise of all other[]" judicial powers—*i.e.*, necessary for the *court* to function effectively. *Chambers* v. *Nasco, Inc.*, 111 S .Ct. 2123, 2132 (1991) (quoting *United States* v. *Hudson & Goodwin*), 11 U.S. (7 Cranch) 32, 34 (1812)). *This* is the inquiry required by the "rule of necessity." [2]

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litigation they wish to support, and will therefore either discourage such support or lead to interference with the attorney-client relationship. See Pet. 16-18.

[2] See also *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) ("[t]he ability to punish disobedience to judicial orders is regarded *as essential* in ensuring that the Judiciary has a means to vindicate its own authority") (emphasis added); *Cooke* v. *United States*, 267 U.S. 517, 539 (1925) (contempt is a power "a judge *must have* and exercise in protecting the due and

Neither of the courts below even purported to address this critical question. Had they done so, they plainly could not have imposed sanctions upon petitioner, for reasons explained in the petition. Pet. 10-11.[3]

Second, respondents' attempt to distinguish the Fourth Circuit's decision in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied, sub nom. Chambers* v. *Dep't of the Army*, 111 S. Ct. 1580 (1991) (see Opp. 11-13) rests upon a misreading of the facts in that case. Contrary to respondents' claim (Opp. 12-13), Julius Chambers, one of the attorneys sanctioned in *Blue*, was sanctioned both for his conduct prior to leaving his firm *and* for his conduct while Director-Counsel of the NAACP Legal Defense Fund (the "LDF"). *See Harris* v. *Marsh*, 123 F.R.D. 204, 223-228 (E.D.N.C. 1988). Indeed, the district court specifically imposed $4,000 in sanctions on Chambers for his conduct during the merits trial of Blue's claims (*id.* at 228), most of which occurred after Chambers moved to the LDF. Respondents also overlook the fact that the district court initially found the conduct of a second LDF attorney, Penda Hair, to be sanctionable as well. *Id.* at 215 n.11, 219-23. Because of the involvement of LDF attorneys in some of the conduct the court found to be sanctionable, the district court observed that assessing sanctions only against Chambers' private law firm would be "a problematic and somewhat unjustified proposition." *Id.* at 215 n.11. Hence, respondents are simply mistaken in

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orderly administration of justice . . ."); *Michaelson* v. *United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 65-66 (1924) (contempt power "is essential to the administration of justice").

[3] Moreover, respondents do not dispute that all of the specific instances of alleged misconduct found by the court of appeals could have been readied under Rule 11. See Pet. 10-11. Therefore, even the "policy concerns" cited by the courts below did not require that sanctions be imposed upon petitioner rather than the responsible attorneys.

asserting that all of the sanctioned conduct was "unrelated to . . . LDF employment." Opp. at 12.

Respondents are also wrong in asserting that unlike the petitioners here, LDF did not "finance" the litigation in *Blue*. Opp. at 13. LDF "sponsored" or "financed" the litigation in *Blue* by providing the services of its attorneys, Chambers and Hair, free of charge. *See Harris* v. *Marsh,* 123 F.R.D. at 219 n.13 (describing differing degrees to which LDF may become involved in cases). Similarly, PLF in this case supported the litigation by providing the services of attorneys on its staff. The fact that only PLF attorneys were involved in the instant case while non-LDF as well as LDF attorneys were involved in *Blue* is a distinction without a material difference.

Moreover, it is immaterial that there is no "preclusive order" in the present case explicitly preventing PLF from shifting the huge monetary sanctions imposed upon it to its individual attorney employees. It is unlikely that any public interest organization would shift such a burden to its employees, or that such organizations could long endure if they did so; hence there was no need for the court below to issue a "preclusive order" similar to that issued in *Blue*. Respondents, in short, cannot escape the fact that, in the decision below, the Ninth Circuit upheld just the kind of distributional judgment that the Fourth Circuit held impermissible in *Blue*: a judgment between the individual attorneys who committed the alleged misconduct and the entity that employed them. *See id.* at 549 (striking down district court's prohibition on contribution from the LDF); *id.* (striking down district court's sanction on Chambers' law firm and observing that "we are doubtful that . . . sanctions theories will support sanctions against an entire firm rather than against the individual lawyers who acted improperly"). Had the Ninth Circuit followed the holdings in *Blue*, the sanction imposed upon petitioner would have been set aside.

Third, much of respondents' submission (see Opp. 14-21) erroneously assumes that petitioner and, presumably, the other public-interest legal foundations that have appeared as *amici* here, are seeking a blanket "sanctions immunity" (Opp. 15) for all litigation-oriented public-interest organizations.

Thus, for example, respondents seek to minimize the significance of the Ninth Circuit's decision by pointing to *Avirgan* v. *Hull*, 932 F.2d 1572 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 and *cert. denied*, 113 S. Ct. 405 (1992), in which the Eleventh Circuit upheld a sanctions award against a public-interest law firm. There, however, sanctions were explicitly premised upon the fact that the Christic Institute was plaintiffs' "official law firm" (*id.* at 1582), whereas the Ninth Circuit in this case affirmed a sanctions award against petitioner despite its finding that petitioner "is *not* a law firm" and was not itself representing the plaintiffs below (App. A-11 & n.2 (emphasis added)).

Petitioners and its *amici* do not contend that public-interest organizations are entitled to blanket immunity from litigation sanctions. But where, as here, the organization is not a party and is not itself representing any party (as it was in *Avirgan*), there simply is no justification for imposing sanctions upon the organization rather than the attorney or party who actually committed the misconduct at issue. Resort to the court's inherent power in such circumstances is lawless and inappropriate. See *supra* at 2; Pet. 8-13.

Most of respondents' remaining arguments are irrelevant for the same reason.[4] The issue here is not

[4] These include respondents' labored arguments that "California charitable corporations are regularly held responsible for the acts of their employees" (Opp. 14-15); that Congress has allowed sanctions to be imposed upon the Legal Services Corporation (Opp. 15-16); that under common-law agency principles a public-interest organization may be held liable for the actions of its agents (Opp.

whether an organization like petitioner is immune from litigation-related sanctions. Rather, the issue is whether a federal district court has inherent power to impose sanctions upon *any* person or organization that is neither a party nor an attorney, based upon the attorney's conduct of the litigation.[5]

2. Similarly, nothing in respondents' brief casts any doubt on the need to grant certiorari to resolve the second issue presented, *i.e.*, whether a district court may impose litigation sanctions upon an entity over whom the court lacks *in personam* jurisdiction. See Pet. i.

First, even if respondents were correct about the degree to which petitioner "participated" in the litigation below (Opp. 22-24), such participation is insufficient to confer *in personam* jurisdiction, for reasons explained in the petition (at 13-15).[6] Respondents do not dispute that

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20-21); that "public interest litigation does not require immunity from sanctions" (Opp. 18); and that neither a federal tax exemption (Opp. 16) nor the First Amendment (Opp. 19) confers immunity from sanctions awards. None of these arguments provides a basis for the exercise of inherent power to sanction someone who is neither an attorney nor a part of the litigation.

[5] Respondents also argue that, "[s]ince the PLF was the potential beneficiary of any attorney's fees awarded, equity also supports imposition [of sanctions] on the PLF." Opp. 16. While this argument goes to the merits rather than the need to review the decision below, respondents ignore the fact that any fees received by PLF would simply reimburse PLF for costs it had already incurred in supporting the litigation. A fee award would thus not have conferred a windfall upon PLF, and there is therefore no "equity" argument for imposing sanctions upon PLF rather than the attorneys who committed the alleged misconduct.

[6] Respondents do not and could not dispute that the district court was required to obtain personal jurisdiction over petitioner in order to impose sanctions against it. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("[A] court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.").

petitioner never became a party to the litigation by suing one of the defendants or by being served with process. Nor do respondents cite any authority in support of the Ninth Circuit's novel holding that what it termed "sponsorship" of litigation—*i.e.*, allegedly using plaintiffs as "pawns" or "puppets" (see App. A-11 to A-13)—is sufficient to confer *in personam* jurisdiction. See Opp. 23-24. Instead, respondents simply quote the Ninth Circuit's analysis (*id.*), as though mere repetition would give it more weight.[7]

Second, respondents' attempts to distinguish *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and *Panther Pumps & Equipment Co.* v. *Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978), are misguided. As petitioner demonstrated (Pet. 13-14)—and respondents do not dispute—the Ninth Circuit's analysis is indistinguishable from the "alter ego" theory which *Zenith* and *Panther Pumps* expressly rejected as a basis for *in personam* jurisdiction. 395 U.S. at 110; 566 F.2d at 23. The fact that those decisions "did not involve sanctions issues" (Opp. 26) is irrelevant.

Respondents' other distinction—their murky suggestion that the parties contesting jurisdiction in those cases did not "appear" until a later stage of the proceedings (see Opp. 26-27)—is both irrelevant and false. In both of those cases, the parties contesting jurisdiction entered appearances as soon as another party proposed that a judgment be entered against them. See 395 U.S. at 109; 566 F.2d at 22-23. In this case, petitioner entered an appearance at precisely the same point, *i.e.*, when respondents first formally proposed to impose sanctions on

[7] Respondents' recitation of the district court's analysis of the jurisdictional basis for its order (Opp. 22-23) is irrelevant. As explained in the Petition (at 13-14), the court of appeals expressly rejected the district court's conclusion that PLF itself is a law firm or that PLF, in its own capacity, represented the plaintiffs below.

petitioner itself. See CR 506, 510. The conflict between the decisions below on the one hand, and *Zenith* and *Panther Pumps* on the other, could hardly be more clear.

Third, respondents err in claiming (Opp. 24-25) that petitioner waived its jurisdictional objection. As a threshold matter, the courts below never invoked waiver as a reason for rejecting petitioners' objection.[8] Accordingly, respondents' waiver claim would not ordinarily be considered by this Court, even on the merits. See, *e.g.*, *Air Courier Conference* v. *American Postal Workers*, 111 S. Ct. 913, 917 (1991); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, PLF repeatedly contested the district court's *in personam* jurisdiction. For example, PLF's Objections to the Report and Recommendations of the Special Master included a section entitled "The Court Lacks Jurisdiction to Sanction Pacific Legal Foundation." There, PLF stated:

> PLF's primary objection to these proceedings has always been that it is neither a party nor an attorney in this action and thus cannot be held liable for sanctions. Notwithstanding the indisputable facts of PLF's status, the Report proposes to find PLF liable for sanctions under the Court's "inherent authority." Such authority can extend only so far as the Court's jurisdiction, however, and thus the Court should examine PLF's status in this case carefully.

CR 648 at 5 (emphasis added, footnote omitted).[9] While respondents quibble with PLF's failure to use the phrases

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[8] As explained in the petition (at 13-14), the district court responded to that objection by finding that PLF, in its own capacity, was the attorney for the plaintiffs, while the court of appeals rejected that theory in favor of its theory that PLF was the "sponsor" of the litigation and the plaintiffs mere "puppets" or "pawns" of PLF.

[9] PLF made the same argument in its first responsive pleading, which was an opposition to respondents' motion that petitioner be sanctioned:

"*in personam*" or "personal" jurisdiction, the basis for PLF's objection could hardly be more clear: Inasmuch as diversity had never been asserted as a basis for jurisdiction, and the district court obviously had subject matter jurisdiction over the underlying lawsuit, the court could not have understood PLF's argument as anything other than an objection on personal jurisdiction grounds.[10]

As pointed out in the joint brief of the NAACP and Mexican American Legal Defense and Educational Funds (at 4), the decision below "has grave implications for the ability of [public interest] organizations to carry out constitutionally protected activities." Nothing in respondents' submission casts any doubt on this conclusion or, more generally, on the necessity and propriety of review by this Court. To the contrary, this case is an excellent vehicle for resolving the existing confusion among the lower federal courts over the appropriate scope of a district court's "inherent power" to impose fee-shifting sanctions on public-interest organizations.

> Pacific Legal Foundation is not a party in this case. Pacific Legal Foundation has not signed a "pleading, motion, or other paper" to be filed in this Court. Pacific Legal Foundation is not admitted to practice law before this or any other Court of the United States or its territories.

CR 510 at 1.

[10] Respondents also argue that all objections to the court's lack of *in personam* jurisdiction were waived for failure to enter a "special appearance." Opp. at 24-25. While such an argument would have been valid more than half a century ago, the enactment of the Federal Rules of Civil Procedure eliminated the distinction between special and general appearances in federal court proceedings. See *Blank* v. *Bitker*, 135 F.2d 962, 966 (7th Cir. 1943).

CONCLUSION

For the foregoing reasons, and for those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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